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VIRGINIA & K. RY. CO. *v.* HENINGER.

Sept. 9, 1909.

[65 S. E. 495.]

**1. Contracts (§ 170\*)—Construction—Construction by Parties.**—Where the provision of an excavating contract, providing the method of measuring the material excavated, was ambiguous, the practical construction placed upon it by the parties was entitled to great consideration in construing the contract, especially where the commissioners found that the method contended for by defendant had never been used and was impracticable.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 170.\* 3 Va.-W. Va. Enc. Dig. 401.]

**2. Appeal and Error (§ 266\*)—Exceptions—Necessities—Report of Commissioners.**—Any error of the commissioners in failing to allow for shrinkage of earth in measuring fills, in an action upon an excavating contract, cannot be first urged on appeal, where the finding of the commissioners was not excepted to on that ground; such error not appearing on the face of the report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1571; Dec. Dig. § 266.\* 1 Va.-W. Va. Enc. Dig. 565; 11 id. 757.]

**3. Appeal and Error (§ 1022\*)—Findings of Commissioners—Conclusiveness—Approval by Court.**—Where it is not clear that the commissioners, whose finding was approved by the court, erred in allowing plaintiff solid rock prices, instead of earth prices, for removing certain material, the court on appeal will not disturb such finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\* 11 Va.-W. Va. Enc. Dig. 757, et seq.]

**4. Contracts (§ 300\*)—Time of Performance—Extension.**—Changes in an excavation contract, which required more work to be done, made after the original contract was executed, necessarily gave the contractor the right to further time for its completion.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1379; Dec. Dig. § 300.\* 13 Va.-W. Va. Enc. Dig. 979.]

Judgment affirmed. All the judges concur.

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BROWN *v.* ORR.

Sept. 9, 1909.

[65 S. E. 499.]

**1. Partnership (§ 73\*)—Rights as to Third Persons—Lien.**—Where partnership funds were used to purchase and improve land conveyed

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

to the wife of a partner, a lien upon the property to the extent of the sum used resulted in favor of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 126; Dec. Dig. § 78.\* 10 Va.-W. Va. Enc. Dig. 839; 6 id. 556; 13 id. 295, 321.]

**2. Executors and Administrators (§ 55\*)—Assets—Ownership.**

Where, though a lot was conveyed to defendant alone, it was purchased for the joint benefit of her husband and herself, and the deferred purchase-money note given by their vendee was payable to them jointly, the husband's estate was prima facie entitled to one-half the balance of the price due from the vendee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 306; Dec. Dig. § 55.\* 5 Va.-W. Va. Enc. Dig. 517; 13 id. 284.]

**3. Subrogation (§ 23\*)—Persons Discharging Debts.**—Where property purchased by defendant and her husband, in part with partnership funds, while he was insolvent, was subsequently conveyed to her, defendant was entitled to be subrogated to the rights of her husband's creditors against his estate to the extent that she paid off his indebtedness with her own funds.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 60; Dec. Dig. § 23.\* 12 Va.-W. Va. Enc. Dig. 994, et seq.]

Judgment affirmed. All the judges concur.

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INTERSTATE R. CO. *v.* TYREE.

Sept. 9, 1909,

[65 S. E. 500.]

**1. Master and Servant (§ 240\*)—Injuries—Contributory Negligence—Evidence.**—That a brakeman's foot, ankle, and leg were caught and crushed while coupling cars equipped with automatic couplers does not justify a finding of contributory negligence per se.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 755; Dec. Dig. § 240.\* 10 Va.-W. Va. Enc. Dig. 406, et seq.]

**2. Negligence (§ 113\*)—Pleading—Negating Contributory Negligence.**—Contributory negligence is a matter of defense, which need not be anticipated or negated by plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 186; Dec. Dig. § 113.\* 10 Va.-W. Va. Enc. Dig. 400.]

**3. Negligence (§ 122\*)—Burden of Proof—Contributory Negligence.**—The burden of proving contributory negligence is upon defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 221; Dec. Dig. § 122.\* 10 Va.-W. Va. Enc. Dig. 406.]

**4. Negligence (§ 135\*)—Actions—Weight of Evidence.**—Contribu-

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.